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Red Cliffs Corner, L.L.C. v. J.J. Hunan, Inc. dba J.J. Hunan Sum Fun Food, and R. Alan Knox : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

RED CLIFFS CORNER, L.L.C.,

Plaintiff, Appellee, and Cross-
Appellant,

vs.

J.J. HUNAN, INC. dba J.J. HUNAN SUM
FUN FOOD, and R. ALAN KNOX,

Defendants, Appellants, and Cross-
Appellees.

APPELLANTS' REPLY BRIEF

Court of Appeals Case No. 20070846-CA

District Court Civil Case No. 050500538

Appeal from the Judgment and Order of the Fifth Judicial
District Court of Washington County, State of Utah, Honorable Eric A. Ludlow

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(Oral Argument Requested)

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

Appellants J.J. Hunan, Inc. (“Hunan”) and Alan Knox (“Knox”) hereby incorporate the statement of issues presented for appeal as set forth in their opening brief. In addition to those issues, the following issue has been raised by Appellee Red Cliffs Corner, L.L.C. (“RCC”) in its cross-appeal:

1. Whether the trial court erred in refusing to award RCC its request for attorneys’ fees where Hunan and Knox were forced to forfeit \$58,405.36 in landlord improvements which RCC failed to complete.

The question of whether attorney fees are recoverable in an action is a question of law that an appellate court reviews for correctness. A.K.& R. Whipple Plumbing & Heating v. Guy, 2002 UT App 73 ¶ 7, 47 P.3d 92. Hunan and Knox do not dispute that RCC properly preserved this issue below.

ARGUMENT

I. THE TRIAL COURT CORRECTLY DENIED RCC’S REQUEST FOR ATTORNEYS’ FEES

RCC challenges the trial court’s denial of its request for its attorneys’ fees as incorrect. RCC is mistaken. Although a court “may award reasonable attorney fees in accordance with the terms of the parties’ agreement,” Trayner v. Cushing, 688 P.2d 856, 858 (Utah 1984), “courts have, in extraordinary circumstances, declined to award attorney fees to a prevailing party in spite of an enforceable contract provision.” A.K. & R. Whipple Plumbing & Heating v. Guy, 2002 UT 73 at ¶ 7. The case at hand presents just

such “extraordinary circumstances” where Hunan and Knox were forced to forfeit the \$58,405.36 in tenant improvements they made without being reimbursed by RCC.

In Fullmer v. Blood, 546 P.2d 606 (Utah 1976), the Utah Supreme Court affirmed a trial court’s denial of a prevailing party’s request for attorneys’ fees in spite of an enforceable contractual provision. The plaintiffs had brought an action to quiet title to real property and to declare forfeiture of \$12,150 paid by the defendant under a uniform real estate contract. Id. at 607. The contract at issue “provided that in case of default the defaulting party shall pay costs and expenses, including a reasonable attorney’s fee incurred in enforcing the agreement, or in pursuing any remedy with respect to the property.” Id. at 610. While the trial court ultimately held that there had been a forfeiture, it denied the plaintiffs’ request for attorneys’ fees. Id.

On appeal, the Fullmer court affirmed the trial court’s denial of attorneys’ fees, and in so doing held,

[D]ue to the somewhat complicated fact situation in this case, it does not seem to be an unwarranted assumption that both parties thought they had some justification for making their respective claims to the property, which dispute could best be resolved by obtaining an adjudication of their rights therein. A suit of this nature involving the invocation of a forfeiture and/or the enforcement of a purchase contract invokes consideration of the principles of equity which address themselves to the conscience and discretion of the trial court. In addition to other considerations, there is the fact that the plaintiffs had received \$12,150 which is forfeited and not recoverable to the defendant. In view of these circumstances we are not persuaded that the trial court abused its discretion in refusing to require defendant to pay the plaintiffs’ attorneys’ fees.

Id.

As in Fullmer, Hunan and Knox were justified in claiming that RCC's refusal to reimburse them for the \$58,405.36 of landlord improvements was a material breach of the parties' Lease Agreement. (R. 26, 525; Trial Trans. 245). As in Fullmer, the trial court invoked the equitable doctrine of waiver to find that Hunan and Knox waived RCC's breach as well as any claim to reimbursement of the \$58,405.36. (R. 368-363.) And as in Fullmer, RCC was the beneficiary of the \$58,405.36 in improvements which the trial court ordered forfeited and which was unrecoverable by Hunan and Knox. (Id.) The combination of these unique circumstances, as in Fullmer, supports the trial court's denial of RCC's attorneys' fees.

RCC, however, argues that the trial court incorrectly denied its request for attorneys' fees because no "extraordinary circumstances" justified its denial. RCC also cites to Fullmer and contends that since it prevailed on its claims against Hunan and Knox, there are no "extraordinary circumstances" which would justify the denial of its request for attorneys' fees. (Appellee's Op. Br. at 44.) RCC's argument misconstrues the foundation of the Fullmer holding.

While the Fullmer court noted that it was "significant" that the trial court had found against the plaintiffs on one of the main issues of the case, that factor was not the *sine qua non* of the court's analysis. Rather, as cited above, the Utah Supreme Court looked to other factors such as: whether the defendant was justified in making a claim to the property, that principles of equity had been invoked by the trial court, and that the

plaintiffs received a \$12,150 windfall by virtue of the defendant's forfeiture. Fullmer, 546 P.2d at 610. Accordingly, the bare fact that RCC prevailed on its claims at trial did not preclude the trial court from denying RCC its request for fees.

The trial court's denial of RCC's request for attorneys' fees is in harmony with Fullmer. In its Order Denying Plaintiff's Rule 52 Motion to Amend, the trial court noted that it "ultimately found defendants were legally barred from recovering on their tenant improvements." (R. at 402.) As in Fullmer, where the defendant was denied \$12,500, Hunan and Knox were prohibited from receiving any compensation for the \$58,405.36 they spent to improve RCC's property. Those improvements proved to be a windfall for RCC, who paid nothing for them and who enjoys them to this day. (R. 192.)

A trial court may properly deny a prevailing party's request for attorneys' fees if, in its sound discretion, the court concludes that the circumstances of the case warrant such a denial. As set forth above, the facts of this case present the kind of "extraordinary circumstances" which support the trial court's denial of RCC's attorneys' fees request. Taking into careful consideration the merits of Hunan and Knox's claims, the principles of equity invoked by both parties, and the windfall which RCC received at the expense of Hunan and Knox, the trial court did not incorrectly deny RCC's request for attorneys' fees. Accordingly, the trial court's denial of RCC's Rule 52 Motion to Amend should be affirmed.

II. THIS COURT HAS JURISDICTION TO HEAR THIS APPEAL WHERE THE THIRTY-DAY NOTICE OF APPEAL PERIOD APPLIES

This case falls under the purview of the thirty-day notice of appeal period where it does not solely involve a claim for unlawful detainer. RCC argues that this case does not involve any other claims other than one for unlawful detainer and therefore the ten-day notice of appeal period applies. Additionally, RCC states that this case is subject to the shorter notice of appeal period because there are no equitable claims or claims for declaratory relief. (Appellee's Op. Br. at 19-22.) This argument ignores the facts of this case and should be rejected.

From the outset of this case, it involved more than just a claim for unlawful detainer and breach of the Lease. Unlike Brandley v. Lewis, 92 P.2d 338 (Utah 1939), Hunan and Knox asserted a counterclaim against RCC and RCC initiated a claim against Knox to enforce Knox's personal guarantee. (R. 1-6.) Furthermore, the conversion claim alleged by Hunan and Knox in their Amended Complaint and Counterclaim further illustrates the hybrid nature of this case. (R. 164.)

The inclusion of the conversion claim evidences that the case was not just about unlawful detainer or even a breach of the Lease, but rather encompassed other claims including the enforcement of a personal guarantee and a claim for conversion. However, even if this Court bundles these additional claims with that for unlawful detainer, this case does involve additional equitable claims which subject the case to the thirty-day appeal period.

A case may be removed from the “unlawful detainer” category and its attendant ten day appeal period if equitable claims are present. See Gordon Case & Co. v. West, 2005 UT App 304, ¶¶ 7-11, 117 P.3d 1070. In this case, Hunan and Knox raised equitable claims from the outset when they asserted equitable defenses including estoppel, waiver, and laches in their Answer and Counterclaim. (R. at 25.) Moreover, the trial court ruled against Hunan and Knox based on the equitable doctrine of waiver, thereby underscoring the equitable claims and nature of this case. (R. 368-374.) Accordingly, this case is unlike Brandley which presented a “straight typical unlawful detainer complaint,” Brandley, 92 P.2d at 339, and more analogous to the hybrid case presented in Fashions Four Corp. v. Fashion Place Associates, 691 P.2d 831 (Utah 1984).

RCC attempts to repaint the landscape of this case by asserting that it is, like Brandley, solely one about unlawful detainer. This blanket characterization ignores RCC’s own claim against Knox along with the equitable claims raised by Hunan and Knox as well as the trial court’s ultimate equitable determination. Moreover, Hunan and Knox’s conversation claim illustrates the hybrid nature of this case and supports Hunan and Knox’s contention that the thirty-day notice of appeal period applies.

III. THE TRIAL COURT ERRED IN CONCLUDING THAT RCC PROPERLY TERMINATED THE LEASE WHERE HUNAN WAS NEVER IN MATERIAL DEFAULT OF THE LEASE

The Lease’s plain language does not support the trial court’s ruling that RCC properly terminated the Lease with Hunan. The operative inquiry for purposes of this

issue is what meaning should be given to the Lease's Material Default and Breach

Provision which provides,

Tenant shall be in material default and breach under this Lease if (I) Tenant shall default in the payment as and when due of any Minimum Rent, Additional Rent or any other amount required to be paid by Tenant hereunder, and such default shall continue for a period of ten (10) days after written notice thereof from Landlord.

(Appellants' Op. Br. Add. Exh. 1 at 32-33.)

As set forth in their opening brief, Hunan and Knox contend that this language defines a "material default and breach" as occurring only if Hunan refused to pay its rent for ten days after receiving a written notice from RCC. If no written notice or the opportunity to cure is provided, even if Hunan is late with its rent, that does not constitute a breach of the Lease let alone a material default and breach.

In its opening brief, RCC does not dispute that it failed to send Hunan written notification of Hunan's late rent and a ten-day opportunity to cure. Rather, RCC relies on a tortured reading of the Lease which pretends the written notice and opportunity to cure language never existed. While all the parties may agree that the Lease provides a written notice and opportunity to cure requirement, only Hunan and Knox's interpretation of the Lease gives credence to this language.

RCC argues that the "Cure Period and the Default Notice have nothing to do with RCC's termination of Hunan's tenancy or with the issues on appeal." (Appellee's Op. Br. at 26.) Nothing could be further from the truth. The Lease is clear that a material default and breach only occur if Hunan withheld its rent after receiving a written notice and ten

days to cure. Where no notice or opportunity were provided, then a material default and breach did not occur. RCC's interpretation of the Lease renders the notice and cure provision optional; an exercise to be enforced on its own whim. RCC even goes so far as to say that to give notice and the opportunity to cure would have been a "meaningless gesture" since Hunan did paid its rent along with the requisite late fees. (Appellee's Op. Br. at 29.) However, the fact that Hunan ultimately paid its rent does not relieve RCC of the obligation to send the written notice to begin with.

The language of the Lease regarding what constitutes a material breach and default is clear: a failure to pay rent for a period of ten days after written notice from RCC. Where RCC never provided written notice, Hunan could not have materially breached the Lease for late rent alone. Had the Lease simply provided for a material breach and default upon the failure to pay rent, then RCC's argument would be more tenable. However, the Lease's language requires such written notice and RCC undisputedly failed to provide that. Accordingly, Hunan did not materially breach the Lease and was not in default and RCC should not have terminated the Lease.

RCC also argues that the Lease's Termination Provision is not premised on RCC providing written notice and the opportunity to cure with each of the three consecutive defaults. (Appellee's Op. Br. at 28-29.) The Termination Provision permits RCC's termination of the Lease once Hunan defaulted in its rent obligation for three consecutive months, then followed by a late payment in one additional month. RCC's argument,

however, is again based on its erroneous assertion that written notice and the opportunity to cure is optional.

RCC contends that once Hunan failed to pay rent on time for three consecutive months, regardless of whether notice and time to cure was provided, RCC was permitted to terminate Hunan's lease. While it is true that Hunan was late with its rent for three consecutive months, those late payments do not classify as a default under the Lease let alone rise to a material default and breach where no written notice and cure opportunity were provided. The Termination Provision provides RCC with protection in the event Hunan were to habitually default i.e., failed to pay its rent even after receiving notice, in the payment of its rent. However, Hunan's late rent payments do not classify as defaults since they were never accompanied with RCC's written notice and opportunity to cure. Moreover, the Termination Provision contemplates the notice and opportunity to cure requirement where its language references those provisions and Hunan's opportunity to cure late payments. (Add. Exh. 1. at 36.)

The Lease is unambiguous in classifying a late rent payment as a default and breach only if Hunan did so after receiving written notice of the delinquency and the opportunity to cure. As hard as RCC may try, this language is clear and unescapable. For the reasons set forth above, along with those set forth in the Appellants' opening brief, the trial court's interpretation of the Lease should be rejected.

IV. WHERE HUNAN NEVER BREACHED THE TERMS OF THE LEASE WITH RCC IT WAS NOT IN UNLAWFUL DETAINER AND WAS NEVER A TENANT AT WILL

As RCC and Knox argued in their opening brief, Hunan did not unlawfully detain the Premises. However, even if Hunan was in unlawful detainer, RCC failed to comply with the notice and cure provision of Utah Code Ann. § 78-36-3(1)(c)¹, and therefore improperly evicted Hunan.

In its opening brief, RCC argues that Utah Code Ann. § 78B-6-802(1)(b)(ii), which tellingly contains no notice or cure provision, applies in this case. RCC argues that this statute is controlling because it deals with tenancies at will. (Appellee's Op. Br. at 30-31.) RCC's argument is premised on the assumption that Hunan was in fact a tenant at will based on its alleged breach of the Lease. For the reasons set forth above, as well as those advanced in Hunan and Knox's opening brief, Hunan was not a tenant at will and therefore § 78-36-3(1)(c) is the applicable statute in this case. As such, it is undisputed that RCC failed to provide written notice and the three day opportunity to cure called for by the statute. By failing to comply with the statute's clear written notice and opportunity to cure requirement, RCC's eviction of Hunan was improper and the trial court should be reversed.

¹ This section has been recodified as U.C.A. § 78B-6-802.

V. THE TRIAL COURT ABUSED ITS DISCRETION IN RULING AGAINST HUNAN AND KNOX BASED ON THE EQUITABLE DOCTRINE OF WAIVER

The clear weight of facts in this case demonstrate that neither Hunan nor Knox waived their claim that RCC breached the Lease by failing to complete the Landlord's Work. Moreover, the trial court abused its discretion in invoking the equitable doctrine of waiver on RCC's behalf where RCC lacked the requisite clean hands.

RCC does not address Hunan and Knox's argument that the trial court abused its discretion in awarding the equitable remedy of waiver to a party without clean hands. As Hunan and Knox have previously asserted, Utah courts are clear that to seek equity, a party must do so with clean hands. See Buckner v. Kennard, 2004 UT 78, ¶ 99, 57 P.3d 842; Pledger v. Gillespie, 1999 UT 54, ¶ 21, 982 P.2d 572. Accordingly, for the reasons set forth in their opening brief, Hunan and Knox ask the Court to reverse the trial court's ruling that Hunan and Knox waived their claims against RCC where RCC lacked the clean hands necessary to benefit from that remedy.

The equitable doctrine of waiver does present mixed questions of law and fact. Chen v. Stewart, 2004 UT 82, ¶ 23, 100 P.3d 1177. The question of whether the proper standard of waiver was applied presents a legal question which is reviewed for correctness, while "the actions or events allegedly supporting waiver are factual in nature and should be reviewed as factual determinations." Id. A trial court's findings of fact will only be set aside where "[a]n appellant must marshal the evidence in support of the

findings and then demonstrate that despite the evidence, the trial court's findings are so lacking in support as to be against the clear weight of evidence." Id. at ¶ 19 quoting In re Estate of Bartell, 776 P.2d 885, 886 (Utah 1989).

Hunan and Knox have not challenged the first two elements of waiver, but have challenged the trial court's legal conclusion that Hunan and Knox intended to relinquish its right to pursue a claim against RCC for breach of the Lease. (R. 370-373.) The trial court's conclusion of law set forth the facts it relied upon in coming to its legal conclusion. Based on the nature of the equitable remedy, the application of the legal standard for determining whether this third element was satisfied, Hunan and Knox contend that the marshaling requirement did not attach. However, even if it did, Hunan and Knox did marshal the evidence by citing to each fact that supported the trial court's conclusion.

In their opening brief, Hunan and Knox cite to the specific testimony presented at trial which supported the trial court's conclusion and findings of fact. (Appellants' Op. Br. at 24.) While Hunan and Knox did not cite to the specific factual finding in the trial court's Findings of Fact and Conclusions of Law, their citation to the trial transcript and actual case record supplies this Court with the same evidence and facts relied upon by the trial court in reaching its conclusion. After citing to all of the evidence the trial court relied upon, Hunan and Knox then cited the facts supporting their position that they did not waive their claim against RCC. (Id. at 24-26.)

Hunan and Knox's citation to all of the facts the trial court relied upon in making its legal conclusion satisfies the marshaling requirement. Furthermore, Hunan and Knox contend that the marshaling requirement does not apply to this case where Hunan and Knox are challenging the application of the proper standard of waiver, which does not carry with it the marshaling requirement.

VI. THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING HUNAN AND KNOX'S MOTION TO AMEND ITS COUNTERCLAIM

The trial court's denial of Hunan and Knox's Motion to Amend was an abuse of discretion and should be reversed. Hunan and Knox filed their Motion to Amend prior to the deadline for amending pleadings as established by the court's scheduling order. (R. 136.) However, the trial court denied Hunan and Knox's Motion to Amend, in part, because the court believed Hunan and Knox had waited too long to file a Request to Submit for Decision. As set forth in their opening brief, this ruling was erroneous and contrary to Utah Rule of Civil Procedure 7(d).

The trial court set forth seven different reasons for denying Hunan and Knox's Motion to Amend. (R. 255-258.) Two of these reasons, the second and seventh, are based on the court's erroneous conclusion that Hunan and Knox waited too long to file a Request to Submit on their Motion to Amend. (R. 255-257.) The remaining five conclusions are:

1. Hunan and Knox failed to set forth with any particularity the grounds for their Motion to Amend to be granted;

2. Hunan and Knox did not file a reply memorandum in support of their Motion to Amend and failed to show any discovery being done that would be consistent with the amended claims they sought;
3. At oral argument, Hunan and Knox did not provide the court with a reason for why they had waited to file their Request to Submit but argued that their Motion should be considered one akin to a Motion to Amend to conform the pleadings to the evidence at trial;
4. Hunan and Knox's counsel attempted to specify several specific facts to support the Motion to Amend that were not supported by affidavit or credible documents; and
5. The claims Hunan and Knox asserted in their proposed Amended Complaint were not based on newly discovered facts brought out through the discovery process.

(R. 255-257.) For the following reasons, each of these conclusions was erroneous.

First, the trial court's assertion that Hunan and Knox's Motion to Amend failed to set forth with particularity the grounds for granting it is belied by the Motion to Amend itself.

In the Motion to Amend, Hunan and Knox incorporated their Amended Counterclaim which sets forth with particularity the basis of their conversion and breach of the Lease claims. Rather than restating all of those factual allegations and legal arguments in the Motion to Amend itself, Hunan and Knox avoided such redundancy by attaching their Amended Counterclaim to the Motion to Amend and then referencing the Amended Counterclaim. Accordingly, Hunan and Knox did set forth with particularity the basis for granting their Motion to Amend and the trial court ruled incorrectly.

Second, the fact that Hunan and Knox chose to not file a reply brief in support of their Motion to Amend is not fatal to their Motion and discovery was unnecessary to support their Amended Counterclaim.

The trial court noted that “although a Memorandum in Opposition to their Motion was timely filed, Defendants did not file any reply memorandum contradicting the case law brought out by Plaintiff that the failure to set forth particular grounds for relief is fatal to their Motion.” (R. at 255.) However, a reply memorandum is not a mandatory filing and the failure to file this optional memorandum should not have been fatal to Hunan and Knox’s Motion to Amend.

Utah Rule of Civil Procedure 7(c)(1) provides that “[w]ithin five days after service of the memorandum in opposition, the moving party *may* file a reply memorandum.” Utah R. Civ. P. 7(c)(1) (2008)(emphasis added). The inclusion of the word “may” signals that a reply memorandum is optional and not mandated by the Rule. Moreover, Utah Rule of Civil Procedure 7(d) provides that, “[t]he request to submit for decision shall state . . . the date the reply memorandum, *if any*, was served.” Utah R. Civ. P. 7(d) (2008) (emphasis added). Rule 7(d), therefore, also recognizes the optional nature of the reply memorandum. Additionally, nothing in Rule 7(d) prohibits a moving party from filing a request to submit if a reply memorandum has not been filed. In short, the fact that Hunan and Knox chose not to file the optional reply memorandum does not preclude them from having their original Motion to Amend heard by the Court.

The trial court's conclusion that there had been no discovery to show any new facts or evidence that would require an amendment to the Answer and Counterclaim was also clearly erroneous.

Hunan and Knox's Amended Counterclaim sought to include a claim for conversion based on RCC's refusal to turn over \$100,000 worth of personal property to Hunan and Knox after it took possession of the Premises. (R. 160-163.) The basis for the conversion claim arose once RCC refused to return the personal property which Hunan and Knox had left on the Premises after being evicted. No discovery was needed to establish this claim. Hunan and Knox did not need to conduct depositions, document requests, requests for admission, or interrogatories to establish what they already knew: that RCC had taken their personal property and refused to return it. Consequently, no discovery was needed to mine for new facts to establish their conversion claim.

Hunan and Knox did not include their conversion claim in their original Answer and Counterclaim because RCC had not yet converted their personal property. Once RCC took possession of the Premises in May of 2005 and refused to return the property to Hunan and Knox the conversion claim arose. (R. 191-192; 525; Trial Trans. 12.) Discovery would not have provided any new facts for Hunan and Knox in support of their claim. The trial court's insistence that new discovery support the conversion claim was unnecessary and erroneous.

Third, Hunan and Knox waited to file their Request to Submit because they were actively involved in negotiations with RCC to recover their property without litigation. However, as set forth in their opening brief, Hunan and Knox contend that the timing of their Request to Submit is irrelevant where neither Rule 7(d), nor any other Utah rule of civil procedure, renders a moving party's motion untimely when a request to submit is not filed by a certain date. Indeed, the operative inquiry is not when Hunan and Knox's Request to Submit was filed, but rather, when the original Motion to Amend was.

In this case, the Motion to Amend was filed prior to the deadline for amending pleadings and the Motion should have been granted. Hunan and Knox's position is supported by Berkshires L.L.C. v. Sykes, 2005 UT App 536, 127 P.3d 1243, where the moving party filed its motion to amend after the close of discovery. Unlike the facts of Berkshires, however, Hunan and Knox filed their Motion to Amend prior to the amendment of pleadings deadline and the fact it waited to file its Request to Submit is immaterial.

Fourth, the trial court abused its discretion in denying the Motion to Amend on the grounds that oral statements introduced at the hearing on the Motion were not supported by affidavit. At the hearing, Russell S. Walker ("Walker"), attorney for Hunan and Knox, explained that the delay in filing the Request to Submit was due to ongoing negotiations he had been having with RCC's counsel to retrieve Hunan and Knox's personal property. Walker stated that once those negotiations had broken down, and the prospect for

retrieving the property outside of court vanished, Hunan and Knox filed the Request to Submit.

Hunan and Knox assert that no affidavits were necessary in this case since the hearing on the Motion to Amend was not an evidentiary hearing. Moreover, an affidavit would have been unnecessary since Walker was the party familiar with the facts surrounding the Motion to Amend and Request to Submit. Since Walker was available and present at the hearing on the Motion to Amend, his affidavit was unnecessary since he could provide live testimony before the trial court about both his negotiations regarding the personal property and the status of the Motion to Amend and Request to Submit.

Utah Rule of Civil Procedure 11(b), which governs an affidavit signed by an attorney, provides that by signing a paper to the court, “an attorney . . . is certifying that to the best of the person’s knowledge, information, and belief, formed after an inquiry reasonable under the circumstances . . . the allegations and other factual contentions have evidentiary support.” Utah R. Civ. P. 11(b) (2008). Had Walker filed an affidavit with the trial court in support of Hunan and Knox’s Motion to Amend, it would not have varied at all from the live testimony he gave at the hearing. Additionally, Walker’s statements were all based on his personal knowledge since he, not another party, had been the one negotiating with RCC to retrieve Hunan and Knox’s personal property. Walker’s

oral statements regarding the Motion to Amend and Request to Submit were appropriate and an affidavit was therefore unnecessary.

Fifth, the trial court repeated its conclusion that the Amended Counterclaim was “not based on newly discovered facts brought out through the discovery process.” (R. at 256.) As explained above, discovery was unnecessary to bring to light the additional claim of conversion and breach of the Lease against RCC. Once RCC took Hunan and Knox’s property and refused to return it the conversion claim arose, embarking on discovery would not have shed any additional light on that claim. The additional breach of the Lease claim was also not dependent on new discovery since it was based on the original breach of Lease claim set forth in the Answer and Counterclaim.

CONCLUSION

For the foregoing reasons, Hunan and Knox respectfully ask this Court to reverse the trial court’s Judgment.

DATED this 23rd day of October, 2008.

WOODBURY & KESLER, P.C.



Russell S. Walker

David R. Williams

Attorneys for Defendants, Appellants, Cross-Appellees

CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of October, 2008, I mailed two true and correct copies of the foregoing **APPELLANTS' REPLY BRIEF** postage prepaid, by First-Class U.S. Mail to the following:

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